No. 85-1578

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSE MINAYA, M.D.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL FOR
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

MANUEL LOPEZ
F. A. DE LA PENA
ROBERT SCOTT
1526 West Temple Street
Los Angeles, California 90026
(213) 484-1536

Attorneys for Petitioner

Counsel of Record

150 pp

QUESTIONS PRESENTED

1. Whether a fair trial is denied to an accused where a hostile and negative environment is intentionally created against an accused so as to prevent an impartial review of the facts.

2. Whether a conviction can stand where an accused has been denied due process of law by design.

3. Whether a conviction can stand where an accused has been denied a fair trial by design.

4. Whether a conviction can stand where the basis for the conviction is erroneously admitted prejudicial evidence.

5. Whether a fair trial has abeen denied where an accustion of a heinous crime has been intentionally and erroneously misjoined to the case, in order to create hostility and contmept towards an accused

so as to prevent an impartial reveiw of the facts.

6. Whether a fair trial is denied by the introduction of irrelevant evidence admitted with the intent to create the distortion that the accused is unworthy of an impartial review of the facts of his case.

7. Whether a fair trial is denied by prosecutorial misconduct in the form of misstatements of law to the jury, made with the intent to arouse the passions of the jurors against the accused.

8. Whether a denial of a fair trial constitutes a violation of the United States Constitution.

9. Whether a denial of due process of law and equal protection of the law constitutes a violation of the United States Constitution.

TOPICAL INDEX

	Page
Questions Presented	passim
Table of Authorities	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	13
1. The Defendant Was Denied a Fair Trial and Due Process of Law By the Admission of Irrelevant, Prejudicial Evidence	14
2. The Defendant Was Denied a Fair Trial and Due Process of Law By the Joinder of the Dismissed Mayhem Count With False Claims and Grand Theft Count and the Failure of the Trial Court to Declare a Mistrial After the Dismissal of the Mayhem Count	32
CONCLUSION	51
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Nelson (1968) 390 U.S. 523	50
Bumper v. North Carolina (1968) 391 U.S. 543, 88 S.Ct. 1788	29
Chapman v. California (1967) 386 U.S. 18	49
Coleman v. Superior Court (1981) 116 Cal.App.3d 129	38, 39
Estes v. Texas (1960) 381 U.S. 532, 85 S.Ct. 1628	25, 26 27, 49
Fahey v. Connecticut (1963) 375 U.S. 85, 84 S.Ct. 229	29
Fontaine v. California (1968) 390 U.S. 593	50
Gideon v. Wainright (1963) 372 U.S. 335	28, 49
Griffin v. California (1965) 380 U.S. 609	50
In Re Murchison, 349 U.S. 133	27, 28, 49
Irwin v. Dowd (1961) 366 U.S. 717	28, 49
Offutt v. United States, 348 U.S. 11	28, 49

People v. Coltano (1947)
29 Cal.2d 616, 48

People v. Castro (1960)
182 Cal.App.2d 255,
5 Cal.Rptr. 906 48

People v. Chessman (1959)
52 CAl.2d 467 39

People v. DeFoor,
100 Cal. 150 34

People v. Guerrero (1976)
10 Cal.3d 719 20, 40

People v. Johnson (1960)
1078 Cal.App.2d,
3 Cal.Rptr. 28 48

People v. Kelly (1962)
66 Cal.2d 232, 57 Cal.Rptr. 363,
424 P.2d 947 19

People v. Kemp (1961)
55 Cal.2d 458 39

People v. Mollette (1940)
39 Cal.App.2d 294, 102 P.2d 1084 48

People v. Morelock (1956)
46 Cal.2d 141, 292 P.2d 897 48

People v. Pike (1962)
58 Cal.2d 70 40

People v. Richards (1927)
86 Cal. 86 16

People v. Scott (1944)
24 Cal.2d 774 40

People F. Thompson (1980)
27 Cal.3d 303 20

People v. Thorn (1934)
138 Cal.App. 714 38, 39

People v. Vera,
131 Cal.App.2d 6691 34

Rideau v. Louisiana (1963)
373 U.S. 723 28

Smith v. Superior Court (1970)
5 Cal.App.3d 260 17

Stroble v. California (1952)
343 U.S. 181 28, 49

Tumney v. Ohio,
273 U.S. 510 49

Turner v. Louisiana (1965)
379 U.S. 466 28, 49

White v. Maryland (1963)
373 U.S. 59 28, 49

Constitution

U.S. Constitution,
Fifth, Sixth and
Fourteenth Amendments 2, 24, 25

Statutes

California Evidence Code,
Section 210 19

Section 350 18

California Penal Code,
Section 7 (4) 35

Section 72 4, 16, 37, 38, 41

Section 203 4, 5, 34, 36, 37, 38, 41

Section 484 37, 38, 41

Section 487 4, 41

Section 487(1) 37, 38

Section 572 37

Section 954 37, 38

Section 1118.1 9

Title 28 United States Code,
Section 1257(3) 2

Texts

California Jury Instruction
Criminal, Fourth Edition,
Volume 2 41

Fricke and Alarcon on Crimes,
Page 199 35

Witkin on Crimes,
Sections 282, 283, p. 262 35, 41

Witkin, Criminal Procedures,
Section 456, p. 459 48

No.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1985

JOSE MINAYA, M.D.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, JOSE MINAYA, M.D., respectfully prays that a Writ of Certiorari be issued to review the opinion of the California Court of Appeal which affirmed the Superior Court's Judgment of Conviction and held that Petitioner was not denied a fair trial.

OPINIONS BELOW

The opinion of the California Court of Appeal, of which review is sought, was not published. A copy of said opinion is included in the Appendix to this petition.

JURISDICTION

Petitioner invokes the jursidiction of this Court under Rule 28, USC, Section 1257(3), on the grounds that his rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, were violated.

The California Court of Appeal entered its order rejecting petitioner's contentions on October 9, 1985.

The California Supreme Court denied petitioner a hearing in this case, on January 23, 1986. The instant petition for

Writ of Certiorari filed within 60 days of that order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> NO PERSON SHALL . . . BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW . . .

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED . . . AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION . . .

3. The Fourteenth Amendment to the United States Constitution provides in

relevant part:

> . . . NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION, THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

Petitioner, JOSE MINAYA, M.D., was charged in an eight count information with violations of California Penal Code, Section 72, 487 and 203, presenting false claims, grand theft and mayhem respectively. Counts I through VI charged violations of Penal Code 72, with the basis for the accusations being the presentation of alleged false claims. Count VIII, which charged the defendant with grand theft, was based on the cumulation of the alleged

false claims serving as the basis for the grand theft charge.

Count VII, a count for mayhem, was joined to the information as will be shown hereinafter, without a legal or factual basis.

Prior to the preliminary hearing stage, and at filing of information, the petitioner demurred to the People's Complaint.

On January 18, 1982, Petitioner, JOSE MINAYA, Pleaded not guilty to the eight counts charged in the information.

On June 18, 1982, a motion was filed by petitioner to sever Count VII, which alleged a violation of California Penal Code Section 203, mayhem. The petitioner's contention was that the accusation of the crime of mayhem was not warranted under the facts -- and was totally disimilar, and not of the "same class" of crimes as in the case of presenting false Medi-Cal claims;

and therefore had to be severed from the remaining counts. Also, it was argued that the severance of the mayhem was mandated in the interests of justice, in order to provide petitioner with a fair trial and avoidance of undue prejudice. On June 30, 1982, the severance motion was denied.

On November, 1983, the petitioner's trial commenced in the Superior Court of the State of California, for the County of Los Angeles.

On January 11, 1984, the Court, on its own motion, granted petitioner's earlier motion to dismiss Count VII, mayhem, charged in information.

On January 18, 1984, petitioner was found guilty after a trial by jury of Counts I through VI, and Count VIII charged in the information, the false claims counts, and grand theft count respectively.

On April 14, 1984, the petitioner's motion for a new trial was argued. The petitioner contended that he was denied a fair trial by the admission of irrelevant prejudicial evidence and the court's failure to sever the mayhem count prior to the trial.

On April 24, 1984, the motion for a new trial was denied.

On April 24, 1984, petitioner was sentenced to State Prison, for a term of four years: eight months each on Counts I, II and III; to run consecutively; and two years on Count VIII; to run consecutively to Counts I, II and III and eight months each on Counts IV, V and VI, with stays of execution. In addition, petitioner was fined $10,000 for each of Counts I through VI, and ordered to make restitution in the sum of $14,865.80, for a total of $74,865.80 in payments.

On April 24, 1984, petitioner filed Notice of Appeal to the California Court of Appeal from the Superior Court's Judgment.

The central theme of the People's case below was that the defendant, a licensed physician in Los Angeles specializing in opthamology, falsified Medi-Cal Treatment Authorization Requests (TARS) in order to obtain permission to perform elective cataract surgeries upon Medi-Cal beneficiaries. The People's contention was that the cataract surgeries were not medically justified and that the TARs were falsified at the direction of the defendant so that he could obtain payment from the State of California that he was not entitled to by false pretenses. Five of the false claims counts pertained to the alleged falsification of TARs and the sixth false claims count pertained to an alleged falsification of an

operative report on Josephina Tobio, under a similar theory, that is the alleged false operative report was submitted to the State of California form payment based on a false pretense, to wit, theat the cataract surgery was medically justified. Count VII of the information alleged a mayhem perpetrated on Medi-Cal recipient Josephina Tobio. The mayhem count was dismissed, prior to the submission of the case to the jury pursuant to Penal Code §1118.1, in that there was no evidence of an intent to injure, presented by the People.

The common thread that ran centrally through the false claims counts was that the visual acuity of the patients was allegedly falsified so as to warrant the Medi-Cal reviewing physician to authorize the elective surgery. The single grand theft count was based on a larceny by false pretenses, as to an accumulated amount of all of the monies received from the surgeries

performed on the Medi-Cal recipients named in the false claims counts.

The legal theory for the false claims and grand theft counts is quite an interesting one from a medical-legal point of view: criminal overutilization; the criminal overutilization in the context as proffered by the prosecutor dealt with performing unnecessary cataract surgeries as opposed to billing and being paid for services not rendered, the classic false claims/grand theft case.

In proof of the contentions set forth in the Information, the prosecutor called a number of physicians who testified as to the standard of care as to the necessity for cataract surgery and then rendered an opinion based on their review of the medical charts that although the TARs set forth a medical justification and/or other medical factors in their opinion(s) indicated

that surgery was unnecessary. A number of witnesses who had worked for the defendant or were still working for him gave testimony as to how the defendant, who during the timeframe in question operated a very large volume opthamological practice at a number of office locations in the greater Los Angeles area, ran his office and billed. A portion of the testimony dealt with the administrative incompetence of the defendant's offices and how accounts were not billed and insurance checks not cashed.

The defense tendered by the defendant was a lack of specific intent to file false claims and to steal, as well as medical testimony that all of the patients upon whom surgery was performed had cataracts. The defense to the mayhem count was that the defendant never intended to injure Mrs. Tobio.

However, additionally, the prosecution called all of the patients on whose behalf a claim was filed to testify extensively as to post-surgery results. Many medical experts were also called to testify as to post-surgery results of not only the specified patients, but as to other patients treated by petitioner. A tremendous volume of evidence concerning post-surgery results was placed before the jury. So much evidence of post-surgery results was placed before the jury that the direction and character of the trial was changed into what the prosecution promoted as "theft of eyesight."

Petitioner timely objected to the introduction of each and all post-surgery results and testimony into evidence during the course of the trial.

On appeal to the California Court of Appeal, the petitioner specifically raised the issue that he had been denied a fair

trial: (1) due to denial of pre-trial severance, and (2) the admission of highly irrelevant, inflammatory and prejudicial evidence of results of the cataract surgeries. These contentions were specifically set forth in petitioner's opening brief to that court.

The same points and contentions were also submitted to the California Supreme Court in the petitioner's petition for review, filed with the Court.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the most basic and sacred precepts of Constitutional Law as they pertain to criminal prosecution. Specifically, they are the Constitutional provisions of Due Process of law and equal protection of the law and that an accused has the

undeniable right to a fair and impartial trial.

The questions presented in this petition have a far-reaching impact on criminal procedure and basic Constitutional concepts and rights that must be observed and upheld in all criminal prosecutions.

The petitioner will show precisely how he was denied a fair trial and how erroneously admitted prejudicial evidence was used to accomplish this denial.

1. The Defendant Was Denied a Fair Trial and Due Process of Law By the Admission of Irrelevant, Prejudicial Evidence.

A summary of the post-surgery evidence and its designation in the record, is attached and included in the Appendix to this petition.

The following is an analysis of the relevancy of prejudicial matter in the form of post-surgery evidence and testimony admitted into evidence.

With regard to post-surgery evidence, the People argued that it was necessary to prove its case and the California Court of Appeal stated:

> "How else could the People be expected to prove a specific intent to defraud and steal without showing the before and after effect of such surgeries."

Although at first glance this statement might seem plausible, in reality, this statement defies reason and logic when analyzed within the context of the charges against petitioner. It appears that the Court of Appeal was implying and stating that a surgeon can never be guilty of a specific intent to defraud or steal when he has good results; and a completely honest surgeon might be guilty of fraud if

he has bad results. If this is to be accepted, then the Trial Court and the California Court of Appeal are promoting the concept of trial by ordeal: If the results are good, the defendant is innocent, if the results are bad, the defendant is guilty.

In order to lay a better foundation for the presentation of the issues a summary of applicable California law is in order:

Clearly the elements of the violation of California Penal Code Section 72, as applicable herein, simply stated are: (1) The presentation of a false claim for payment; (2) with the intent to defraud; (3) to Medi-Cal officials. Penal Code Section 72.

The crime is committed and completed when the claim is presented. People v. Richards (1927) 86 Cal. 86, 89; Smith v.

Superior Court (1970) 5 Cal.App.3d 260, 263.

In ascertaining the relevancy of evidence, based on the theory promoted by the Prosecution, it becomes increasingly apparent that what is relevant and critical is the visual acuity and conduct before the surgeries. The concept put forth by the prosecution was that the defendant billed Medi-Cal for unnecessary surgeries and that the visual acuity charts of the patients were falsified. If this were true, then the actual fraud would have been the falsified pre-surgery based on the pre-surgery visual acuity of the pre-surgery charts and forms. This is the area where the evidence should have been produced and limited to. The results of surgeries have no logical connection to this alleged fraud. It is the actual visual acuity before the surgeries that determines the fraud. A simple test

bears this out: Let us assume that there exists a patient who falls within the guidelines of Medi-Cal for the necessity and authorization of eye surgery. Let us also assume that a surgery is performed within these guidelines, but unfortunately does not go well, and the patient's eyesight is completely lost. Does this occurrence constitute fraud? Obviously not, because the result of the surgery has nothing whatsoever to do with fraud. Similarly, good results could not negate any preexisting fraud. It becomes apparent that fraud can only be proved by a showing of evidence as to conditions in existence prior to surgery. Accordingly, any intent would be based on the visual acuity before the purported unnecessary surgery.

California Evidence Code Section 350 states:

> "No evidence is admissible except relevant evidence."

California Code Section 210 states:

> "Relevant evidence, meaning evidence including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

The General Test of Admissibility of evidence in a criminal matter is whether it tends to logically, naturally and by reasonable inference, establish any fact material upon the people or to overcome any material fact sought to be proved by the defense. People v. Kelly (1962) 66 Cal.2d 232, 239, 57 Cal.Rptr. 363, 424 P.2d 947.

It appears clear that the post-surgery conditions of the witnesses and patients mentioned in each count, was not and never was in issue, nor did it in any way reveal, prove or disprove any intent concerning the charges. Therefore, that evidence was clearly irrelevant and should never have

been admitted. However, the prosecution sought to justify the admission of the results of the surgeries on the grounds that results could demonstrate an intent to present false claims on the part of defendant. However, the admission of such evidence "cannot be justified merely by asserting an admissible purpose." People v. Guerrero (1976) 10 Cal.3d 719, 724. It must be shown that the evidence is logically relevant to prove the defendant's intent as to the crimes charged. People v. Thompson (1980) 27 Cal.3d 303, 319. As it has been already demonstrated herein, a specific intent to present false claims can never be shown by post-surgery results.

Although arguably, other crimes and acts have been held admissible to show intent, a plan, scheme, any allusion to post-surgery results of any acts, purported crimes or other occurrences are still

completely irrelevant because this cannot possibly show or have any bearing on an intent to present a false claim based on pre-surgery visual acuity.

Furthermore, based on the prosecution's theory of fraud, the fact that surgeries took place at all was irrelevant. The prosecution's theory was not that the defendant billed for surgeries that never took place, but that bills were submitted fraudulently on behalf of patients who did not fall within the Medi-cal guidelines based on their pre-surgery visual acuity. So long as a bill was falsely submitted on behalf of someone not meeting the visual acuity standards, it is irrelevant whether surgery took place or not. What is crucial is the presentation of a claim that was purportedly falsified and in reality did not fall within the Medi-Cal guidelines.

Therefore, the surgeries and especially the results of the surgeries were clearly irrelevant.

It furthermore becomes clear that what the prosecution was attempting to do in the present case was to create a hostile and prejudicial atmosphere against the defendant by not limiting itself to the relevant elements of the crimes charged, and by putting on a case for other crimes and occurrences for which the defendant was never charged. This is why the post-operative evidence was so important to the prosecution.

The objectionable evidence admitted in this matter in addition to being irrelevant and non-probative, as to the false claims and grand theft courts was also extremely inflammatory and prejudicial and cast a negative cloud of hostility in the eyes of the jury over the defendant. The

post-operative surgery evidence did not go to show an intent to obtain money but rather to show the infliction of physical harm, under the prosecutions "theft of eyesight" concept, as stated to the jury.

Once the trial court permitted the prejudicial flood gates to be opened, and the hostile atmosphere to be created, the prosecution could have obtained virtually any kind of a conviction it so desired.

The strategy and intent of the prosecution clearly manifests itself in the prosecution's statement to the jury in final argument in which it was stated: "the real theft was the eyesight of those patients." Nothing could be more revealing as to the intent to create hostility towards Petitioner.

The permission and prejudicial effect of this evidence is to permit the defendant to be tried in a hostile and negative

atmosphere with a lack of impartiality.

The foregoing strategy and conduct by the prosecution was erroneously permitted by the trial court, violating one of the most fundamental and basic concepts of Due Process of Law.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution are also clear as to due process standards.

The Fifth Amendment to the United States Constitution, in pertinent part, states:

> . . . Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment in pertinent part states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . .

The Fourteenth Amendment in pertinent part states:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deny any person of life, liberty or property without due process of law . . . nor deny equal protection of the laws.

The decision of the California Court of Appeal is inconsistent with the precepts of the Fifth, Sixth and Fourteenth Amendments to the Constitution.

Furthermore, the United States Supreme Court has specifically dealt with the issue of an accused being entitled to a fair trial. In the case of Estes v. Texas (1960) 381 U.S. 532, 85 S.Ct. 1628, the Court held that an accused was entitled to a fair trial as a matter of Constitutional right and law. The court in the Estes v. Texas case, supra, further stated:

"Significantly, in the Sixth Amendment the words 'speedy and public' qualify the term trial and the rest of the amendment defines specific protection the accused is to have at his trial. Thus, the Sixth Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a trial - a word with a meaning of its own, see Bridges v. California, 314 U.S. 252, 271."

"The Fourteenth Amendment which places limitations on the State's administration of their criminal laws also gives content to the term trial. Whether the Sixth Amendment as a whole applies to the States through the Fourteenth, or the Fourteenth Amendment embraces only those portions of the Sixth Amendment that are fundamental or the Fourteenth Amendment incorporates a standard of ordered liberty apart from the specific guarantees of the Bill of Rights, it has been recognized that State prosecutions must, at least, comport with the fundamental conception of a fair trial."

The constant flow of irrelevant and prejudicial evidence in the present matter denied the petitioner a fair trial. The Estes v. Texas (1965) 381 U.S. 532, case

is important because it stands for the precept that an accused has a constitutional right to due process which includes a fair trial and the mere superficiality or skeletal appearance of due process, without true essence, is meaningless.

In the Estes case, supra, such an enormous quantity of pre-trial publicity was created and permitted so as to deny the accused in that case a fair trial. An even stranger case exists in the present matter where, by design, technically irrelevant evidence was used to create a hostile environment against the petitioner. In order to ensure due process of law and a fair trial, this court should not permit the denial of due process by design.

The issue of a fair trial as it pertains to due process was also dealt with in In Re Marchison, 349 U.S. 133 where the United States Supreme Court held:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

The same issue was similarly dealt with in Offutt v. United States, 348 U.S. 11, 141, and Tumey v. Ohio, 273 U.S. 510.

The issue was further dealt with in Stroble v. California, 343 U.S. 181 (1952) and Irwin v. Dowd, 366 U.S. 717 (1961).

The issue of a fair trial was furthermore dealt with in Gideon v. Wainright, 372 U.S. 335 (1963) and White v. Maryland, 373 U.S. 59 (1963); Rideau v. Louisiana, 373 U.S. 723 (1963); and Turner v. Louisiana, 379 U.S. 466 (1965).

In all of the foregoing cases the United States Supreme Court held that a fair trial was an essential, integral component of due process of law.

The right to a fair trial is very basic and has far reaching implications. If an accused has been denied a fair trial, then, our total society has been denied a fair trial and we are all thereby legally poorer. If there is any right that should be consistently upheld, it is the right to a fair trial so that the judicial process can function in reality towards the ends of justice.

Furthermore, the United States Supreme Court has repeatedly held that the erroneous admission of prejudicial evidence will cause the conviction to be reversed. Fahey v. Connecticut (1963) 375 U.S. 85, 84 S.Ct. 229; Bunker v. North Carolina (1968) 391 U.S. 543, 88 S.Ct. 1788, 1792.

In the present matter the California Court of Appeal conceded that the post-surgery evidence was prejudicial but perceived it to be relevant to show the intent

to defraud. As shown herein by a summary of California law and analysis in the evidence admitted, the evidence was not relevant. Therefore, in the present case, we have prejudicial evidence that was erroneously admitted. As a result, the conviction based on the prejudicial erroneously admitted evidence should be reversed.

Time and again it becomes apparent that the real thrust of the trial, as manifested by the evidence presented, and admitted, argument and ruling of the trial court, was that the defendant was being tried for "Theft of Eyesight." This all took place under the guise of a trial for fraud.

Therefore, the question that must be asked, in this day and age, in a civilized society, is whether this type of prejudicial disorder can be permitted to stand.

For all the inappropriate accusations and the like, there can be no doubt, with all due respect, that the defendant is a victim of blinding prejudice. In other words, the trial court, the prosecution and the judicial process ultimately became victims of what they permitted to take place. They permitted such an array of prejudicial evidence and statements to go forth, that they themselves ultimately became prejudiced against the defendant and permitted the violation of the most basic and sacred of constitutional rights.

Whatever the distorted perception of the defendant is or was, the United States Constitution, the laws of California and the rights created thereby, stand superior and supreme.

2. The Defendant Was Denied a Fair Trial and Due Process of Law By the Joinder of the Dismissed Mayhem Count With False Claims and Grand Theft Count and the Failure of the Trial Court to Declare a Mistrial After the Dismissal of the Mayhem Count.

The petitioner was effectively denied his constitutional right to a fair trial by the improper joinder of a count for mayhem that was subsequently dismissed.

Petitioner, JOSE MINAYA was tried before a jury on information charging him with filing false claims (six counts, grand theft (one count) and mayhem (one count). Prior to the trial, defendant timely moved for a severance of the mayhem counts from the other counts on the grounds that the mayhem count was totally dissimilar. The prosecution opposed the severance motion. In opposing the severance motion, the prosecution stated:

> "In the instant case, the People contend that all counts enumerated in the information contained an element of substantial importance, in that each of the crimes alleged was committed in the course of the Medi-Cal fraud."
>
> "The intent for the mayhem count is supported by the defendant's intent to do a wrongful act, to defraud Medi-Cal." (C.T. 560).

560).

In other words the prosecution contended that an intent to defraud Medi-Cal could be substituted for an intent to commit mayhem. Stated another way, an intent to commit mayhem could be totally dispensed with where some form of fraud was present.

With all due respect, the foregoing logic defies description. It has no foundation in law or reason.

A brief summary of the basic elements of the crime of mayhem under California law

bears this out.

It is a well-established principle of California law that the requisite elements of mayhem, as defined by Penal Code Section 203, are:

> "Every person who unlawfully and maliciously deprives a human being of a member of his body or disables, disfigures or renders it useless, or who cuts or disables the tongue, cuts out an eye, or slits the nose, ear or lip, is guilty of mayhem."

Furthermore, "An assault by the defendant upon the prosecuting witness is an essential element of the charge of mayhem." (People v. De Foor, 100 Cal. 150; People v. Vera, 131 Cal.App.2d 6691.) The injury inflicted must have arisen from an unlawful attempt to inflict a violent injury upon another. It is necessary to constitute mayhem that the act shall have been done "maliciously" and that word, is here amend means and imputs a wish to vex, annoy or

injure another person. Penal Code Section 7(4). See also Fricke and Alarcon on Crimes, P. 199; Witkin on Crimes, Section 282, 283, P. 262.

There is no apparent way that the prosecution could show a violent assault by the allusion to fraud. Any well-informed trial court would have to understand this.

The required intent to commit the violent assault or even the occurence of the violent assault could not be shown by an "intent to defraud Medi-Cal." In order for this logic to sustain itself, fraud would have to constitute a violent act in and of itself. Clearly, fraud is not an act of violence. Without the obvious and crucial element of the violent assault, or even a contention that it could be shown, it was a grave abuse to permit the Joinder of the mayhem count with these fraud counts.

In this regard, the Court of Appeal erred when it contended that the elements of the fraud and mayhem coincided.

It becomes apparent, that the mayhem count was included by the prosecution not because there was a possibility that it could be sustained, but only for the specific purpose and design of denying the defendant a fair and adequate trial on the fraud counts. This clearly and overtly was its desire and strategy. In other words, the mayhem count was not joined in good faith.

The Joinder of the mayhem count was clearly an abuse because the prosecution admittedly, never contended that they could show the mayhem intent required by Penal Code, Section 203.

The prosecution's contention was that they could show an intent to defraud and that the intent to defraud was sufficient

to show mayhem intent.

The contentions of the prosecution were hopelessly flawed because fraud cannot be equated with the crime of mayhem nor does it translate into the same, given the requisite elements prescribed by California law.

The crime of mayhem, and the crime of filing false claims and grand theft are not " . . . different statements of the same offense . . ." as defined by Penal Code, Section 954. The essential elements of mayhem are completely dissimilar from the essential elements of filing false claims and grand theft. (Compare §203 (mayhem) with §§572, 484 and 487(1) (filing false claims and grand theft respectively).

Mayhem as contrasted with filing false claims (§72) and grand theft §§484 and 487(1) by statutory definition is not an offense in " . . . the same class of crimes

. . . " as defined by Penal Code 954. "The same class of crimes" has been defined as "offenses possessing common characteristics or attributes." See People v. Thorn (1934) 138 Cal.App. 714, 734; Coleman v. Superior Court (1981) 116 Cal.App.3d 129, 134. Mayhem is a violent, assaultive crime against the person, while the crimes of filing false claims and grand theft are property crimes. Mayhem requires an unlawful intent to injure coupled with an action which deprives a person of a member of his body, or disables, disfigures or renders it unseless. (§203). Grand theft is a specific intent crime requiring the taking of another's property with the intent to steal (§§484 and 487(1)). The crime of filing false claims is a specific intent crime requiring the intent to defraud and the presentation of a false claim or writing inorder to obtain payment. (Penal Code &72). Clearly

mayhem is legally dissimilar from and does not possess any of the common characteristics or elements of grand theft or filing false claims.

The third statutory basis for joinder is that the " . . . offenses are connected together in their commission." People v. Kemp (1961) 55 Cal.2d 458, 476, pointed out that joinder of offenses was permissible if there was a "common element of substantial importance in their commission;" see, also People v. Thorn (1934) 138 Cal. App. 714, 734-735; Coleman v. Superior Court (1981) 116 Cal.App.3d 129, 134-135. Cases that have upheld the joinder of offenses have found specific, and important factors that connect the crimes; these include the same class of crime coupled with a distinctive modus operandi and the same criminal intent; People v. Chessman (1959) 52 Cal.2d 467, 492; or the fact that the weapon was

common to the offenses; People v. Scott (1944) 24 Cal.2d 774, 778; People v. Pike (1962) 58 Cal.2d 70, 84.

In the instant case, the People contended in the trial court that the charges were properly joined because the counts contained a common element of substantial importance, in that all of the crimes charged were committed in the course of Medi-Cal fraud. (C.T. 560). Unfortunately simply alleging a statutory basis cannot justify joinder if in actual fact there are no common elements of substantial importance: See, e.g., People v. Guerrero (1976) 16 Cal.3d 719, 724.

The results of the Tobio surgery, which was the gravamen of the mayhem count had absolutely no probative value in connection with the proof of any of the essential elements of the false filing claims and grand theft counts. Mayhem requires a

general intent to injury (Penal Code Section 203; 1 Witkin, California Crimes, §§282, 283), false claims and grand theft are specific intent crimes requiring a specific intent to defraud a public agency (Penal Code Section 72) anda specific intent to deprive the owner of property (Penal Code, Sections 484, 487). See Appendis D, California Jury Instructions, Criminal, Fourth Edition. Volume 2. (CALJIC).

Therefore, the purported alleged act of mayhem has no connection to the filing of the false claims or grand theft because meither categories of crimes impacts upon the other. The fraud counts have no elements in common with the mayhem and the mayhem counts has no elements in common with the fraud, nor is it a result of the same occurrence. Surgical results have no logical connection to the presentation of false claims based on pre-surgery conditions.

Clearly, the alleged mayhem was not a result of the presentation or a false claim nor was the false claim a result of the alleged mayhem. The intent required to disfigure or injure is clearly distinct from the intent to defraud. The prosecution cannot dispense with the intent to injure or under the mayhem count by alleging or alluding to fraud, nor can it change the character or class of the crimes by alluding to fraud.

In furtherance of this misapplication of the facts and law, the Court of Appeal erroneously stated:

> "From the lengthy record before us, we see a common and consistent pattern of Appellant's desire to benefit from unnecessary cataract surger regardless of the outcome."

It becomes apparent that this is a distortion of the facts. It was never shown or proven that the defendant had a desire

to benefit from unnecessary cataract surgeries regardless of their outcome. But even if for the sake of argument, we are to accept this perception, it is insufficient to constitute mayhem. In this regard, the Court of Appeal clearly erred. Mere malpractice cannot be equated with mayhem.

Furthermore, in reality all that was shown were the results of a handful of surgeries selectively chosen for presentation by the prosecution. The mere results of intricate surgeries do not, of themselves reveal any desire. Surgery results are subject to many variables.

Further still, no opinion as to the defendant's desire or competency can be made based on the results of a mere handful of surgeries, especially where it was estimated that the defendant saw in excess of 50 patients a day and in excess of a 3-year period all that was revealed was a

handful of alleged malpractice cases. In other words, out of approximately 36,000 patients, only 10 were alleged to involve some form of medical mistake or error. Based on these figures, Dr. Minaya had virtually a 100% accuracy rate in his competency.

Further still, because the selected surgeries did not meet the rigid Medi-Cal standards does not mean that they were unnecessary per se. What is necessary under Medi-Cal standards can be distinguished from the standards in the community where there exists a clear difference of opinion concerning these surgeries.

Once the mayhem count was dismissed, the trial court erred by failing to immediately declare a mistrial. At that point in time, so much prejudicial damage had been done, it was impossible for the defendant to receive a fair trial as to the

remaining counts.

Any contentions as to the validity of the joinder after the trial court dismissed the mayhem count is to truly beg the question. The Court in dismissing the mayhem count, was admi ting error in the joinder. This is especially true where the prosecution was attempting to substitute the intent to defraud for the intent to commit mayhem and specifically, represented to the Court before the commencement of the trial, that this was its contention.

Furthermore, any dispute as to the prejudicial quality of the evidence permitted, based on the mayhem theory, can find no merit.

It it can be said by the trial court that the quantity and quality of the evidence provided "emotionally blurred a review of the facts," it logically follows that a mistrial as to the remaining counts should

have been declared due to the impossibility of fair and impartial review of the facts.

The mere dismissal of the mayhem count, just prior to going to the jury was insufficient to provide the defendant with a fair trial. Prior to that point in the trial, the jury had absorbed such a saturation of tainted and prejudicial evidence, causing an "emotional blur," so as to result in a constructive conviction as to any remaining counts.

3. Prosecutorial Misconduct

In the present matter, there are indications of prosecutioral misconduct. One of the most blatant and apparent was the statement made to the jury by the prosecution during argument. This statement was as follows:

"The real theft was the eyesight of those patients."

This statement appears to be totally improper and damaging, not only because it was intended to and aroused the passion of the jurors against the defendant, but also because it is a misstatement of law. The issue of theft of money was going to the jury. The issue of "theft of eyesight" was not going technically to the jury. By the misstatement, the prosecution placed the issue of theft of eyesight before the jury.

Clearly, if the issue of theft of money was going before the jury, it was a misstatement of law to characterize the theft as being anything else other than the theft of money. By alluding to a "theft of eyesight," the prosecution misstated the law and the legal issue before the jury. This had a confusing and prejudicial effect that could not be overcome thereafter.

Furthermore, under California Law, there exists no such offense technically as "theft of eyesight." The statement therefore, constitutes a misstatment of law per se.

It is well established that an erroneous statement of law designed to influence the verdict is highly improper. People v. Coltano (1947) 29 Cal.2d 616, 619; People v. Morelock (1956) 46 Cal.2d 141, 147, 292 P.2d 897; People v. Mollette (1940) 39 Cal.App.2d 294, 299, 102 P.2d 1084; People v. Johnson (1960) 1078 Cal. App.2d 360, 372, 3 Cal.Rptr. 28; People v. Castro (1960) 182 Cal.App.2d 255, 260, 5 Cal.Rptr. 906. See also Witkin Criminal Procedures, Section 456, P. 459.

The misconduct and the statements made by the prosecution denied the defendant the basic right to a fair trial and permitted the prosecution to change the

character of the trial.

It is well established principle that a defendant has a constitutional right to a fair trial and when he has been denied any essential element of a fair trial, regardless of his apparent guilt or not, the judgment or verdict cannot stand. Estes v. Texas (1960) 381 U.S. 532, 85 S. Ct. 1628; In Re Marchison, 349 U.S. 133; Offutt v. United States, 348 U.S. 11, 14; Tumey v. Ohio, 273 U.S. 510; Stroble v. California (1952) 343 U.S. 181; Irwin v. Dowd (1961) 366 U.S. 717; Gideon v. Wainright, 372 U.S. 335 (1963); White v. Maryland (1963) 373 U.S. 723; Turner v. Louisiana (1965) 379 U.S. 466.

Furthermore, the United States Supreme Court has found prejudicial statements to the jury by prosecutors to serve the basis for reversal or nullification of convictions in Chapman v. California (1967) 386 U.S. 18;

Fontaine v. California (1968)

Griffin v. California (1965) 380 U.S. 609; Anderson v. Nelson (1968) 390 U.S. 523. The same principle should be applied herein.

Based on previous United States Supreme Court decisions there is ample precedent for reversing the judgment in the present case. The conviction and judgment in the present matter is clearly inconsistent with the right of an accused to due process of law and the many decisions and declarations of Constitutional Rights of this Court. In order to maintain uniformity, due process of law, and to prevent and prohibit various forms of prejudicial disorder from proliferating, the conviction herein should be reversed.

CONCLUSION

In Conclusion, it is respectfully submitted that the petitioner has been denied his constitutional rights as set forth and guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. It is furthermore submitted that the conviction and judgment in the present case is inconsistent with the statements of law issesd by this court in countless decisions. Therefore, a writ of certiorari should issue concerning the conviction and judgment in this case obtained in violation of the United States Constitution.

Respectfully submitted,

MANUEL LOPEZ

Attorney for Petitioner

APPENDIX

SUMMARY OF POST-SURGERY EVIDENCE

1. Ernesto Juvera (the Medi-Cal recipient named in count I) over objection testified that after his surgery he did not have good eyesight; that the sun bothered him a great deal; and that he no longer could work around his yard. (R.T. pp. 1086-1890).

2. Rodolfo Bravo (the Medi-Cal recipient named in count III) testified over objection that after his right eye was operated upon by Dr. Minaya, his vision in that eye was almost nil. (R.T. p. 1204).

3. Trina Lopez (the Medi-Cal recipient named in count IV) testified over objection that Dr. Minaya operated on both her eyes and that after she left the hospital she could not see; at the time she testified she could not see;

and she felt great pain in her eyes; and that the lens bothered her. (R.T. pp. 1392-1394).

4. Felix Caballero (the Medi-Cal recipient named in count V) testified over objection that after the surgery performed by Dr. Minaya he could not see well. (R.T. p. 1110-1112).

5. Josephina Tobio (the Medi-Cal recipient named in count VI) (false claims) and count VII (the mayhem count) testified that she could not see out of her left eye without the contact lens in; that her left eye caused her constant pain; that she got dizzy and had headaches. Mr. Tobio testified that before the surgery she sewed and that after the surgery she could not. (R.T. pp. 1228-1233).

6. Mrs. Enriquetta Reade (the Medi-Cal

recipient named in count II) testified over objection that before the surgery performed by Dr. Minaya, she could watch television and swe with her glasses on, after the surgery she could not see out of her right eye. (R.T. pp. 1187-1197).

7. Dr. Robert Gerner, a psychiatrist, who testified for the defendant regarding the defendant's depression and psychiatric problems during the period of time the purported false claims in issue were filed, was vigorously cross-examined by the prosecutor regarding the "blindings" of ten patients during that timeframe. (R.T. p. 2123).

8. Dr. Mathew Bernstein

Dr. Bernstein examined the operation report on Mrs. Lopez, and stated that vitreous was lost during the surgery, and that an intraocular lens was

implanted. (R.T. p. 821, p. 824). Dr. Bernstein testified that a physician does not place a Binkhorst intraocular lens in an eye that has had a loss of vitreous. (R.T. p. 825). Dr. Bernstein saw Mrs. Lopez after her cataract operation and stated that she had hand motion vision in her right eye, that the intraocular lens was wiggling around quite a bit, and that she complained of some pain in her right eye. He further stated that she had lost vision from the first time he had seen her, in that her vision had gone from "count fingers" to "hand motion." (R.T. p. 826).

Dr. Bernstein testified as to the post-operative condition of Mrs. Lopez' left eye, stating that she had several precipitates on her cornea, cystoid

macular edema, and mild iritis. These conditions were a result of the cataract surgery and implantation of an intraocular lens. (R.T. p. 831). Dr. Bernstein described the risks associated with implanting intraocular lenses in both eyes of the same patient ten (10) days apart. (R.T. p. 836). He further testified that Mrs. Lopez' post-operative vision in her left eye ranged from 20/400 to "count fingers," and this change was due to the cystoid macular edema which was a result of the surgery. Dr. Bernstein further stated that Mrs. Lopez had quite a bit of pain, and that he sent her to Dr. Hoffer for a second opinion as to whether the intraocular lines in her left eye should be removed. (R.T. p. 838). Dr. Hoffer recommended removing the lens in order

to decrease Mrs. Lopez' pain, but Mrs. Lopez did not want any more surgery. Dr. Bernstein testified that the only way to control Mrs. Lopez' present pain was with anti-inflammatory drops. Dr. Bernstein stated that it was correct that Mrs. Lopez' left eye, which had been 20/25, was now twice legally blind. (R.T. pp. 840-841).

Dr. Bernstein testified that he examined Mrs. Tobio after her surgery. He stated that there was some vitreous up to the wound from the corneal incision, and that indicated that there had probably been a loss of vitreous at the time of surgery. He further stated that the iris was slightly up-drawn which made the pupil a tear drop rather than a round pupil. Mrs. Tobio had told him that she was having

difficulty with glare, and that she used an anesthetic drop to help her wear her contact lens. (R.T. pp. 845-847). Dr. Bernstein further stated that Mrs. Tobio's vision without her contact lens was hand motion, and that hand motion was worse than legal blindness. (R.T. p. 849).

Dr. Bernstein over objection stated that by the time Mrs. Lopez came to his office he knew that the intraocular lens had caused the inflammation of her eye, and that in his opinion it was definitely against the standard of care to put an intraocular lens in a highly myopic eye. (R.T. pp. 934-935).

9. Dr. William Corbin

Dr. Corbin over objection gave testimony regarding the condition of Ernesto Juvera's eye after cataract surgery

(R.T. p. 1039). Dr. Corbin stated that vision in the left eye was light perception, that there appeared to have been a loss of vitreous at the time of surgery, and that the eye exhibited an anterior uveitis and rubeosis irides. The decrease in the vision in Mr. Juvera's left eye was related to neovascular glaucoma and damage to the optic nerve. (R.T. p. 1040).

10. Dr. Richard Ober

Dr. Ober examined Ernesto Juvera in August, 1979, (post-operative) and stated over objection (R.T. p. 1061) that Juvera's left eye had either a little light perception or no light perception, and that it was shrunken and disorganized, the retina is generally detached, aqueous is not secreted, and the eye has ceased to function). Dr.

Ober stated that this condition was due to secondary glaucoma. The risk of inducing secondary glaucoma is a slight risk in all cataract surgery patients, and Dr. Ober stated that diabetes makes that risk slightly greater. (R.T. p. 1061-1062).

11. Dr. David Savar

Dr. Savar testified over objection (R.T. p. 1262) that the visual acuity in the operated on eye of Eulalia Altamirano never returned to the level of function that was recorded prior to surgery, in that her vision had gone from count fingers at eight (8) feet to as low as count fingers at four (4) feet. (R.T. pp. 1262-1263). Over objection Dr. Savar relates that Sadie

Green[1] has an abnormal iris, and that there were some distortions of the tissues in the inside of her eye. He states that he could not tell from the records whether or not her iris was abnormal prior to the surgery. (R.T. p. 1270). Dr. savar over objection stated that post-operatively, Mrs. Green's eye was irretrievably blind and disfigured. (R.T. pp. 1275-1276).

Dr. Savar also testified in regard to the surgery performed on Domingo

---

1. Sadie Green was an uncharged Medi-Cal patient upon who surgery was performed.

Osuna,[2] and stated that a loss of vitreous occurred during the surgery. (R.T. p. 1283). Dr. savar over objection stated that the chance of an eye recovering good vision is hampered when there has been a loss of vitreous. (R.T. p. 1286).

Dr. Savar testified over objection that Ernesto Juvera did not receive adequate treatment for his glaucoma. (R.T. pp. 1306-1307).

Dr. Savar over objection testified that the Maria Mendoza[3] operation report indicated that a retrobulbar hemorrhage had occurred prior to surgery.

---

2. Domingo Osuna was an uncharge Medi-Cal patient upon whom surgery was performed.

3. Maria Mendoza was an uncharged Medi-Cal patient upon whom surgery was performed.

He also stated that at the time of the operation there was still blood spreading in the area of the iris, which indicated that the hemorrhage had not cleared completely. Dr. Savar noted that there was a loss of vitreous during the Mendoza surgery, and that the prognosis was guarded due to this vitreous loss. (R.T. pp. 1311-1313). Dr. Savar stated over continuing objection (R.T. p. 1318) that the medical records of the post-operative visits of Mr. Gonzales[4] did not indicate that intraocular pressures were taken. (R.T. pp. 1316-1318).

---

4. Mr. Gonzales was an uncharged Medi-Cal patient upon whom surgery was performed.

12. Dr. Arthur Hurt

Dr. Hurt examined the records on Josefina Tobio and testified over objection (R.T. p. 2468) that her left eye had astigmatism in the cornea, and that he felt that this stigmatism was a result of the cataract surgery. He further stated that stigmatism can result where the sutures are put in either too tightly or too loosely. A patient with a high astigmatic refractive error would have a hard time wearing a contact lens. (R.T. pp. 2468-2469).

Excerpt from Record of Defense Counsel's Objection to the Admission of Post-Surgery Evidence.

The following is an excerpt from the record concerning defense counsel's objection to the admission of post-surgery evidence.

"MR. HIRSCH: I would object to the results, to any testimony regarding the results of the operation in this case. It is totally irrelevant to the charges. There's no charge of mayhem. There's no charge of anything which affects, which relates to the results of this surgery.

THE COURT: Doesn't it go directly to the fraud?

MR. HIRSCH: How does the result of the - I would respectfully submit that the result of the operation doesn't go to the questions of fraud, but whether or not the operation was botched, was the worst operation in history, and doesn't go to the question of whether or not there's initially a fraud. It certainly - vitreous loss is something that can happen to any operation. And it is not something which goes to show fraud.

MR. HIRSCH: Also, Your Honor, I would object to anything - I'll just make this a running objection, I hate to keep objecting all the time - but to any effects of surgery, except on the one count that alleges mayhem.

I would submit to the Court it is totally irrelevant to these proceedings and should not be permitted under §§352 of the Evidence Code."

Excerpts from Prosecution's Final Argument to Jury at the Trial.

The following is an excerpt from the prosecution's final argument to jury at Petitioner's trial.

"The real theft was the eyesight of those patients. But for purpose of your deliberation and for purposes of the rules in this case, ironically the victim is the State of California. (R.T. pp 2553-2554)."

Excerpts from Petitioner's opening Brief to the Clifornia Court of Appeal, Second Appellate District, showing that the Issues in Petition for Writ of Certiorari were raised before the Court of Appeal.

The following material consists of excerpts from the petitioner's opening Brief to the California Court of Appeal.

CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION I

THE PEOPLE OF THE STATE OF CALIFORNIA,	2 CRIM
Plaintiff,	Superior Court No: A 344 720
vs.	
JOSE MINAYA, M.D.,	
Defendant	

DEFENDANT'S OPENING BRIEF

***

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES THE HONORABLE HENRY W. SHATFORD PRESIDING.

***

DONALD H. HELLER
A Law Corporation
Donald H. Heller
Janet L. Hill
2143 Hurley Way, Ste 240
Sacramento, CA 95825

Telephone: (916)929-2534

Attorneys for Defendant
Jose Minaya, M.D.

TABLE OF CONTENTS

	PAGE NO.
SUMMARY OF FACTS	1
STATEMENT OF THE CASE	3
RELEVANT PRE-TRIAL MOTIONS	4
A. MOTION TO SEVER COUNTS	4
B. MOTION TO ADMIT EVIDENCE PURSUANT TO §110(b) OF THE EVIDENCE CODE	5
STATEMENT OF THE FACTS	6
THE PEOPLE'S CASE	6
THE DEFENDANT'S CASE	22
ARGUMENT	27
1. THE JOINDER OF THE DISMISSED MAYHEM COUNT WITH THE FALSE CLAIMS AND GRAND THEFT COUNTS RESULTED IN SUBSTANTIAL PREJUDICE TO THE DEFENDANT AND WAS AN ABUSE OF DISCRETION	27
1(a). THE JOINDER OF THE MAYHEM COUNT WITH THE FALSE CLAIMS AND GRAND THEFT COUNTS WAS NOT PROPER UNDER PENAL CODE §954.	29

TABLE OF CONTENTS (CONT'D)

		PAGE NO.
1(b).	THE DEFENDANT WAS SUBSTANTIALLY PREJUDICED BY JOINDER OF THE MAYHEM COUNT WITH THE FALSE CLAIMS AND GRAND THEFT COUNTS	34
1(b)(1)	PREJUDICIAL TESTIMONY AND ARGUMENT	42
1(b)(1)(a)	TESTIMONY OF MEDICAL RECIPIENTS	42
1(b)(1)(b)	MEDICAL TESTIMONY AS TO RESULTS OF SURGERIES	43
1(b)(1)(c)	PROSECUTOR'S FINAL ARGUMENT	46
2.	THE SUBSTANTIAL AND CUMULATIVE EVIDENCE OF UNCHARGED AND UNRELATED CONDUCT AS TO OTHER SURGICAL RESULTS AND THE DEFENDANT'S MEDICAL MALPRACTICE WAS EXTREMELY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL	50
2(a).	PREJUDICIAL TESTIMONY AND ARGUMENT	56

TABLE OF CONTENTS (CONT'D)

		PAGE NO.
2(aX1)	TESTIMONY OF MEDI-CAL RECIPIENTS	56
2(aX2)	MEDICAL TESTIMONY AS TO THE RESULTS OF SURGERIES	57
2(aX3)	PROSECUTOR'S FINAL ARGUMENT	61
CONCLUSION		72

ARGUMENT

THE JOINDER OF THE DISMISSED MAYHEM COUNT WITH THE FALSE CLAIMS AND GRAND THEFT COUNTS RESULTED IN SUBSTANTIAL PREJUDICE TO THE DEFENDANT AND WAS AN ABUSE OF DISCRETION

Defendant, Jose Minaya was tried before a jury on an information charging him with filing false claims in violation of §72 of the Penal Code,[1] (six counts), grand theft in violation of §487(1) (one count) and mayhem in violation of §203. Prior to trial defendant timely moved for a severance of the mayhem count from the grand theft and false claims counts on the grounds that the mayhem count was totally dissimilar from the charges set forth in the other counts and that the interests of justice required severance.

---

1. All statutory references are to the California Penal Code unless otherwise indicated.

(C.T. pp. 525-534). The People opposed defendant's severance motion contenting:

> In the instant case, the People contend that all the counts enumerated in the information contain an element of substantial importance, in that each of the crimes alleged was committed in the course of Medi-Cal fraud.
>
> Contrary to the defendant's assertion that mayhem bears no common element of importance with the submission of false Medi-Cal documents, the submission of false operation report is the essence of the mayhem charge. The People's theory, as demonstrated at a preliminary hearing, is that the defendant falsified the necessity for cataract surgery on Treatment Authorzation Requests and Operation Reports in order to receive payment from Medi-Cal. And further, that the defendant engaged in an ongoing scheme to defraud Medi-Cal from 1974 to 1979 by performing unnecessary cataract surgery. Count five of the Information charges the submission of a false operation report to Medi-Cal for Josefina Tobio. The import of this report is that the defendant represents her vision in the left eye as legally blind, when in fact, she had normal vision in that eye. The intent to do a wrongful act, to defraud Medi-Cal. (C.T. p. 560).

At the end of a length jury trial, the trial court dismissed the mayhem count, finding that there was no evidence presented by the People of an intent to blind in support of the mayhem charge. (R.T. pp. 2538-2539). Unfortunately, the jury had already heard substantial and extremely inflammatory evidence, concerning the results of the surgery performed upon Josefina Tobio, to wit, that Dr. Minaya, in the course and commission of performing unnecessary cataract surgery, blinded and disfigured Ms. Tobio.

THE SUBSTANTIAL AND CUMULATIVE EVIDENCE OF UNCHARGED AND UNRELATED CONDUCT AS TO OTHER SURGICAL RESULTS AND THE DEFENDANT'S MEDICAL MALPRACTICE WAS EXTREMELY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL

Evidence Code §110(a) expressly prohibits the use of uncharged offenses and

conduct if the only theory of relevance is to show propensity or disposition of the defendant to commit the crimes charged. People v. Thompson (1980) 27 Cal. 3d 303, 316; People v. Thomas (1980) 20 Cal. 3d 457, 464. The reason for the rule has been stated in numerous appellate decisions quoting Dean Wigmore (1 Wigmore, Evidence (3d Edition 1940) §194, p. 646.

Opinion of the Court of Appeal for the State of California for The Second Appellate District

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff & Respondent v. JOSE MINAYA, M.D., Defendant & Appellant.	2d CRIM. NUMBER: B005332 (Super. Ct. No. A344720)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry W. Shatford, Judge. Affirmed.

Donald H. Heller and Janet L. Hill for Defendant and Appellant.

John K. Van De Kamp, Attorney General, John R. Gorey, Supervising Deputy Attorney General and Joan Comparet, Deputy Attorney General for Plaintiff and Respondent.

Appellant appeals from a jury verdict and judgment of conviction on seven of eight counts in an information filed by the Attorney General charging appellant with one count of grand theft (Pen. Code, §487, subd. (1)), six counts of filing false Medi-Cal claims (violation Pen. Code, §72) and one count Mayhem (violation Pen. Code, 203). The jury found the appellant guilty of all of the counts except count VII, mayhem, which was dismissed by the court after the People had rested pursuant to Penal Code section 1118.1.

The defendant was thereafter denied probation and sentenced to four years in state prison as follows: The midterm of two years as the base term on count VIII (grand theft), one-third the

midterm of two years on counts I, II and III, to run consecutively to count VIII; and one-third of the midterm of two years on counts IV, V and VI, execution of which was stayed and to become permanent upon serving the sentences in the other counts. In addition, appellant was fined $10,000 for each of counts I through VI (filing false claims). Restitution to the state was also imposed in the sum $14,865.80.

Appellant does not challenge any portion of the judgment imposing sentence in this case.

STATEMENT OF THE CASE

Appellant, specializing in ophthalmology, was charged and convicted primarily of filing falsified Medi-Cal treatment authorization requests (here-

inafter referred to as TARs) in order to obtain permission to perform elective cataract surgeries on Medi-Cal beneficiaries. The People proved that the cataract surgeries were not medically justified and that the TARs were falsified by the appellant himself or at his direction, so that he could obtain payment from the state by false pretenses.

The sixth count charging filing of false claim (a violation of Pen. Code, §72) concerns the victim, Ms. Josefina Tobio of count VII, charging mayhem upon her. The People argued that the appellant blinded Ms. Tobio while performing unnecessary surgery. The court dismissed count VII (mayhem). The matter is relevant in this appeal by virtue of the fact that the

appellant raises as reversible error the failure of the trial court to sever count VII from trial of the other counts.

Count VIII, grand theft, was proven by the People as larceny by false pretense for the accumulation of all monies received from the surgeries performed on the Medi-Cal recipients named in the false claims counts. Appellant does not appeal the conviction or judgment imposed upon count VIII.

The following are the relevant portions of an agreed statement of facts which we are including in summation from a very lengthy court record:

The People's Case

Elvira Moon, an administrative assistant and the custodian of records for a Medi-Cal field office in Los

Angeles, testified as to the manner in which TARs were processed by that Medi-Cal field office. Ms. Moon identified several documents, as TARs processed by her office of the Department of Health Services. These TARs were for the following people: Ernesto Juvera (count I), Enriquetta Reade (count II), Rodolfo Bravo (count III), Trina Lopez (count IV), Felix Caballero (count V), Maria Carmen del Garcia, Eulalia Altamirano, and Maria Mendoza.

Dr. Harold Sanders was employed as an ophthalmological consultant by the Department of Health Services. He testified that he reviewed requests for ophthalmologic surgery and decided whether surgery was indicated; in his decision on whether to authorize cataract surgery, he followed specific

guidelines established by Medi-Cal. Dr. Sanders testified that he would not have approved a TAR for cataract surgery on an eye with vision better than 20/70 unless the patient had special occupational needs for finer vision, and he would not have approved a request for cataract surgery on a patient who had longstanding amblyopia in the eye to be operated upon.

Isabella Scannell was employed by Blue Cross as a records coordinator for Medi-Cal. Blue Cross paid claims presented by hospitals, but did not handle the claims of individual physicians. A hospital claim had to be accompanied by a TAR in order for the claim to be paid. Ms. Scannell identified copies of five TARs as true and accurate copies of the microfilm for the following

patients: Ernesto Juvera, Trina Lopez, Felix Caballero, Maria Carmen del Garcia and Eulalia Altamirano.

Alice Nugent was employed by Dr. Minaya in 1974 to set up a billing system and a patient file system in his office. Each time a patient came into the office, the yellow sheet of the patient record was date stamped.

Her duties involved transcribing TARs which had been dictated by Dr. Minaya. After a TAR was transcribed it was placed on Dr. Minaya's desk for him to sign. Ms. Nugent stated that she never signed a TAR during the period between 1974 and 1976. She never went over the transcribed TARs with Dr. Minaya to verify their accuracy.

Gabriela Grimm Negrete was hired by Dr. Minaya in 1976 to do billing at his

Wilshire office. Each patient had a record which was started on the first visit to the office. The receptionist typed up a form for the file, then the patient would be seen by an optometrist who did a refraction on the patient. The optometrist entered his findings on the patient's record. Then the file and the patient were seen by Dr. Minaya. Dr. Minaya's assistant returned the chart to the receptionist who would schedule another appointment. Next the file was sent to billing, and finally placed on Dr. Minaya's desk.

Ms. Negrete typed Medi-Cal claim forms and some TARs. The claim forms were typed from charge slips which contained written diagnoses and circled billing codes. When the patient had had surgery an operative report was

attached to the claim. The claim was then placed on Dr. Minaya's desk for his signature.

Margaret Reyna was employed by Dr. Minaya in 1975 to work as a medical transcriber at the Wilshire office. She stated that her duties entailed transcribing all the patient information to the chart. She was the only one typing TARs at this time and she typed the TARs from Dr. Minaya's dictation. She then placed the TAR on his desk, and mailed the TAR when it was returned. She and other staff members would sometimes sign TARs for Dr. Minaya.

Ms. Reyna also testified that Dr. Minaya saw fifty to one hundred patients per day. Seventy-five to eighty percent of the patients were Medi-Cal and/

or Medicare patients.

Sylvia Manzur, also known as Sylvia Salazar, was employed by Dr. Minaya from March, 1977 through August, 1978 as a medical biller at the Wilshire office. She typed Medi-Cal and Medicare claims based upon the charge slips prepared by the receptionist. The office procedure for claims was to copy the claim, place a copy in the patient file, and mail the original to Medi-Cal or Medicare.

Nancy Huenafe was employed by Dr. Minaya between 1978 and 1980. She screened patients, obtained visual acuities, neutralized lenses, obtained histories, and assisted Dr. Minaya in minor office surgeries. The office procedure was for her to take a gross acuity, then send the patient's file

to the optometrist.

Ms. Huenafe testified she remembered testing Josefina Tobio's vision. She stated that she first tested Ms. Tobio without her glasses, but did not write these measurements in the chart. She recalled that Ms. Tobio's vision without glasses was 20/100 in the right eye and 20/80 in the left eye.

Ernesto Juvera (count I) testified that in August 1976 he went to Dr. Minaya because his vision bothered him when he drove. Dr. Minaya told him that he had cataracts in both eyes. Juvera's left eye was operated on, but he stated that Dr. Minaya had told him that the right eye was to be operated on.

Mr. Juvera testified that after the operation he did not have good eyesight,

that the sun bothered him a great deal, and that he could not work around the yard.

Dr. Sanders, who reviewed TARs for the Department of Health Services, was shown the TAR for Mr. Juvera's right eye. He testified that he would not have approved the TAR, but that it was approved by another doctor at the department who supposedly had followed the same standards and guidelines as Dr. Sanders. He was also shown Mr. Juvera's patient record. He stated that given those figures, he also would not have authorized surgery on the right eye.

Dr. Colyear, the medical adviser for Blue Shield, was not sure whether he would have approved the TAR for Juvera's right eye. He stated that the figures

presented a borderline case and he would want more information on the patient.

Dr. Corbin testified that he conducted a post-operative examination in 1978 on Mr. Juvera, who had been referred to him. Dr. Corbin noted that the vision in the left eye was light perception only, that there appeared to have been a loss of vitreous at the time of the surgery, and that the decreased vision was related to glaucoma and damage to the optic nerve. He also testified that the vision in the right eye was 20/30 in 1978, and there was no evidence of a cataract.

Enriquetta Reade (count II) testified that she went to see Dr. Minaya in January 1977 because she was having trouble reading small print. He told

her she needed surgery, and that she would no longer need glasses after the surgery. Dr. Minaya also told her she had a scar at the back of her eye which affected her vision. She stated that before surgery she could watch television and saw with her glasses on, but after her surgery she could not see out of her right eye. She went to another doctor and had a cornea transplant on her right eye, but still could not see out of that eye.

Dr. Sanders testified that the TARs submitted for Ms. Read's right eye came within the Medi-Cal guidelines for cataract surgery, but he would not have approved a TAR on a 20/40 eye or the implantation of an intraocular lens in a 57-year-old patient in 1977.

Dr. Colyears testified that based

on the pre-operative diagnosis of central glaucoma on Reade's operative report, he would have made further inquiries before he paid the claim. He also stated he would not have authorized payment if it was a 20/40 eye at the time of surgery.

Dr. Savar examined the TAR for Reade and testified that it was consistent with the standard of care for cataract surgery in 1977. Based upon information in the patient's file in the hospital discharge summary, he stated that it was not within the standard of care to perform a cataract operation.

Rodolfo Bravo (count III) testified that Dr. Minaya told him he had cataracts, that he needed surgery, and that he could lose his eye if he did not

have surgery. Prior to seeing Dr. Minaya, Bravo saw Dr. Franklin, an optometrist, who told Mr. Bravo he had cataracts. Mr. Bravo stated that his right eye was operated on, and that his current vision in his right eye was almost nil.

Russell Franklin, an optometrist, testified that he examined Mr. Bravo on September 26, 1976. He stated that Mr. Bravo's vision was 20/30 in the right eye and 20/25 in the left eye, and that both eyes had mild central opacities. Dr. Franklin also stated that Mr. Bravo told him that near and distance vision were blurred with his glasses.

Dr. Colyear stated that he would have authorized payment on the Bravo claim based upon the information in the

operative report. He would not have paid the claim if Bravo's vision at time of surgery was 20/20 and 20/30.

Trina Lopez (count IV) testified that she went to see Dr. Matthew Bernstein, an ophthalmologist, in July 1976 because her right eye itched and vision in that eye was blurred. In November 1976 Ms. Lopez, while hospitalized for a heart condition, discussed the condition of her right eye with her doctor. He referred her to Dr. Minaya, who told her she needed surgery on both eyes. Dr. Minaya operated on Ms. Lopez' right eye on January 10, 1977, and did her left eye on January 20, 1977. Ms. Lopez testified that she could not see, that she felt great pain in her eyes, and that the lenses bothered her.

Leonard Shenkin, an optometrist, testified that he examined Trina Lopez on July 21, 1976. He noted that her vision in the right eye was light perception or less, and that her left eye could be corrected to 20/20. He stated that there was no evidence of cataracts in either of Lopez' eyes.

Dr. Bernstein testified that he examined Ms. Lopez on July 21, 1976. He diagnosed her right eye as having high myopia and amblyopia, and her left eye needed glasses for reading. Ms. Lopez told him she had occasional sharp pain in both of her eyes. Dr. Bernstein stated that her lenses were clear at his examination.

He examined the TARs and operative reports on Ms. Lopez, and stated that they met the standard of care for

for cataract surgery, but that the findings did not comport with his examination six months prior. He testified, using the operation report, that there was a loss of vitreous during Lopez' surgery, and that an intraocular lens was implanted.

Dr. Bernstein examined Ms. Lopez in the summer of 1983. He testified that she had lost vision in her right eye and that the intraocular lens was wiggling around, which may have been the cause of the pain of which she complained. Dr. Bernstein testified that Ms. Lopez' left eye had precipitates on the cornea, mild iritis, and cystoid mascular edema as a result of the cataract surgery. He stated that vision in Ms. Lopez' left eye now ranged from 20/400 down to "counting fingers" because of the cystoid mascular edema caused by

the surgery.

Felix Caballero (count V) testified that he saw another ophthalmologist before he saw Dr. Minaya and that in 1972 and 1974 he was told he had cataracts. He saw Dr. Minaya in the summer of 1975 and had regular visits until his cataract surgery in March 1977. Dr. Minaya sent him to a hospital to have his eyes examined before the surgery in March 1977. After the surgery, Dr. Minaya referred Mr. Caballero to a Dr. Morris.

Mr. Caballero testified that prior to surgery he could read with some difficulty, but could not pass a driving eye test. After the surgery, he stated that he did not see well with his left eye.

Dr. Stephen Ryan, an ophthalmologist, testified that he examined Mr. Caballero

in November 1976. He wrote a letter to Dr. Minaya in which he agreed that Caballero had cataracts, but stated that he did not think surgery was indicated because his vision could be improved to a good level.

Josefina Tobio (count VI and VII) testified that she saw Dr. Minaya in September 1979 because her left eye had blurred vision and itched. She had been told by Dr. Clark that she had a cataract and she saw Dr. Minaya because her cataract was bothering her. She stated that she saw Dr. Minaya two or three times before he operated on her left eye, and that he told her that she would need a contact lens after the operation.

Ms. Tobio testified that prior to surgery she could watch television and

sew. After the surgery, she stated she could not see out of her left eye without the contact lens, that her left eye caused her pain, and that she got dizzy and had headaches. She also stated she could not sew after the surgery.

Dr. Colyear testified that he would authorize payment of the Tobio claim based upon the operation report, but would not have authorized payment based upon the patient's file.

Arthur Hurt, an ophthalmologist, examined the records on Tobio and testified that the stigmatism noted in the patient's chart was the result of surgery.

Dr. Bernstein testified that he examined Ms. Tobio after the surgery on her left eye, at the request of the

Attorney General's Office. He found that she had a cataract in her right eye and her vision was 20/100. She wore a well-fitted contact lens in her left eye, and her vision was 20/40. He stated there appeared to have been a loss of vitreous during the operation, but this was not noted on the report. He also testified that Ms. Tobio had problems with glare, and that without the contact lens she was worse than legally blind. He stated that Dr. Minaya did not do an adequate workup prior to surgery, based upon chart entries.

The Defendant's Case Offering Evidence to Demonstrate Lack of Criminal Responsibility Due to Clerical Error, Oversight, or Inadvertence.

Vicenta Arece testified that she was

employed by Dr. Minaya from 1976 to 1980, and she worked primarily at the Wilshire office. She billed claims, reviewed medical reports, typed TARs, filed records, scheduled surgeries and answered phones. She stated that Dr. Minaya saw fifty to eighty patients per day, that he was in the office between 1:00 p.m. and 11:00 p.m., and that he performed surgery two-to-three days-a-week. She also stated that Dr. Minaya did not do paperwork, and that the staff often signed claims and mailed them after the claims had sat on Dr. Minaya's desk for awhile. Ms. Arece also worked at the Huntington Park office. She testified that both offices were disorganized.

Ms. Arece stated that she had a personal relationship with Dr. Minaya.

She dropped him off at his psychiatrist's office several times, and noted that he was depressed. He often missed appointments and surgeries, and he took medication.

Ms. Arece related that when a TAR was not dictated, the information was obtained from the patient's chart. Also, she signed operation reports and claims, and stated that many claims were disallowed because they were late.

Marie Brown testified that she worked for Dr. Minaya from October 1976 to 1980. She was the manager of the East Los Angeles office for two years, but she also worked at the Wilshire and Huntington Park offices. She stated that the Wilshire office was disorganized and that there were no standard procedures, services were not always billed

and follow-ups were not made on requests by Medi-Cal for more information.

Ms. Brown stated that at times a patient's file could not be located so that a separate sheet was made out for that visit. These sheets were often not included in the original file. She also stated that she typed TARs from dictation, and she would look at that patient's chart if she did not understand the dictation. Ms. Brown also assisted Dr. Minaya when he examined patients, and saw Dr. Minaya explain the risks of surgery, the recuperation period, and safety precautions to patients who required cataract surgery.

Arthur Lucero, a credit and collections manager, testified that Dr. Minaya hired him to do an analysis of

the accounts receivable in June 1981. The analysis went back to 1977, and Mr. Lucero found that some accounts were never billed, that the billing was disorganized, and that files transferred between offices were often lost or delayed.

Dr. Cotlier an opthomologist testified that the Medi-Cal guidelines were rigid and were not the same as the standard of care of the community. He stated that cataract surgery and lens implantation was a fluctuating field, and therefore the guidelines changed.

Felipe Huamonte, an ophthalmologist, examined many of the records admitted in evidence and testified for appellant that the following patients appeared to have had cataracts: Juvera, Reade,

Lopez, Caballero, Tobio, Chavez, Green, Altamirano, Osuna, Mendoza, Taylor, and Bravo. He based his testimony on acuities obtained operation reports, patient charts, patient complaints, and pathology reports.

Charles Clark, an optometrist, testified that Josefina Tobio had been his patient. He noted that her left pupil was a "pinhole pupil." In September 1977 he referred her to Dr. Esteva, an ophthalmologist, and he thought he did this because he suspected cataracts. He saw her again in January 1977 and the vision in her left eye indicated a beginning cataract.

Dr. Clark stated he saw Ms. Tobio in March 1979 and her left eye contained a mature cataract. He referred her to Dr. Bernstein. When Ms. Tobio

returned in April 1980 she had had a cataract operation on her left eye. He refracted her left eye to 20/30 with a cataract lens, and noted that her right eye had a slight cataract. In November 1981 Dr. Clark fitted her with a new contact lens because her old lens was dirty. Her vision was 20/40 to 20/50 in the left eye with the lens on. He also referred her to an ophthalmology group and her left eye was refracted to 20/40.

In the 1981 visit, Ms. Tobio had complained of having problems with her lens and was having dizziness, photophobia, and diplopia. She returned to Dr. Clark in December 1982 and she did not complain of any problems with her lens.

Appellant did not testify.

CONTENTIONS ON APPEAL

I

Did the refusal by the trial court, prior to commencement of trial, to sever count VII (mayhem) from the other counts, create such prejudice against the appellant that he was denied a fair trial?

Appellant cites Penal Code Section 954 as the basis for challenging the judge's pretrial ruling.

Section 954 provides as follows: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two of more different offenses of the same class of crimes or offenses under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the

court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

Appellant argues that the crime of mayhem, being one against the person, is in no way related to or of the same class of those crimes alleged in all the other counts.

We note that counts I through VI the violation of Penal Code Section 72, were alleged to have occurred from August 1976 to October 1979, the time frame of the presentation of false TARs. The crime of mayhem charged in count VII was alleged to have occurred on September 21, 1979, also within the times specified in the other counts, including count VIII, grand theft, between December 1976 and October 1979. Finally, the charge of mayhem is directly related to the factual charge in count VI and both are the result of the same occurrence.

From the lengthy record before us, we see a common and consistent pattern of appellant's desire to benefit from unnecessary cataract surgery, regardless of the outcome of his surgical techniques. It cannot realistically be argued that the crime of mayhem did not arise from the very course of events that were charged in counts I through VI and VIII.

Clearly, Penal Code Section 954 permits charging two or more different offenses in the same pleading, so long as the offenses are connected together in their commission. Could appellant rationally argue that murder would not be logically included if one of his patients died through gross negligent operational procedures and still avoid being charged with fraud if

he filed a fraudulent TAR with respect to that patient?

The test applied here is the existence of a common element of substantial importance among each of the charged crimes, to wit that appellant was defrauding Medi-Cal while performing unnecessary cataract surgery, sometimes in a medically disapproved fashion, all for his own benefit and very much without regard to the consequential effect on his patients.

Such joinder under Penal Code Section 954 is permissive and will only be determined to be error when a clear showing of prejudice can be shown. (Williams v. Superior Court, (1984) 36 Cal 3d 441, 447.) See also for a discussion of permissible joinder People v. Stewart (1985) 165 Cal App 3d 1050, 1056.

Appellant's fraud in this case was to falsify the TARs in order to meet the Medi-Cal standards for cataract surgery so that the Department of Health Services, which had contracted with Blue Shield to pay Medi-Cal for physician services, would pay appellant's surgical billings. Dr. Colyear, the medical adviser for Blue Shield, Examined the claim for Ms. Josefina Tobio and testified that he would have approved payment for cataract surgery if Ms. Tobio's acuities wer 20/200 in her left eye and 20/100 in her right eye as shown in the TAR. However, he would not have approved payment for cataract surgery if Ms. Tobio's acuities were 20/40 in her left eye and 20/50 in her right eye as shown in the actual patient report. This same

pattern emerges as to each of the other false Medi-Cal claims even though the People did not elect to charge criminal assault regarding the quasi-victim's named in counts I through V.

Appellant's cites People v. Kemp (1961) 55 Cal 2d 458, 476 as a decision requiring joinder of offenses only if there is a "common element of substantial importance in their commission." We do not disagree with this ruling and find it applicable here under all of the facts presented. When you have common elements of falsification combined with common elements of unrequired cataract surgeries based on those false reports in all cases, then such common conduct elements exist in all matters.

Because the severance motion lies

entirely within the discretion of the trial court, denial of the motion will not be disturbed on appeal unless its denial results in substantial prejudice to appellant. Such claims of abuse are almost invariably denies. (People v. Matson (1974; 13 Cal 3d 35, 39.)

Appellant's mind was bent on fraud and his inept hands went about doing multifaceted criminal acts which coincidentally led to Ms. Tobio's blindness.

In ruling on appellant's motion to sever, the trial court stated: "I think all of the evidence that will be adduced with respect to the mayhem or the medical fraud is the same evidence that will be adduced with respect to the mayhem . . . People vs. Walker that's cited by the defendant . . . is totally different. In that case, there

was a shotgun that was used on a separate occasion. To bring that in would involve bringing in the defendant's status as an ex-con and that would unduly prejudice the jury. In this case, all of that evidence is going to be introduced assuming we get that far.

So therefore, the motion to sever will be denied." (Emphasis added.)

The ruling on a motion to sever must always be based on weighing its probative value as against its prejudicial effect. But in balancing the effect, the court may consider the beneficial results from the joinder.

Appellant has failed to meet his burden to establish that the trial court effectively abused its discretion, let alone abused it to appellant's actual prejudice. (People v. Matson, Supra,

13 Cal 3d 35.)

Finally as to this issue, appellant cites Evidence Code Section 1101, subdivisions (a) and (b), and People v. Alcala (1984) 36 Cal 3d 604 for the proposition that the trial court erred in allowing trial on the mayhem count to convict appellant on the fraud and theft counts with inadmissible evidence from the other victims. Alcala held it was reversible error to allow evidence of Alcala's prior sexual and assaultive conduct with minor females (uncharged crimes) as prejudicial to his trial on a single charge of murdering a 12-year-old girl.

We do not understand the analogy attempted here. Nowhere have the People proffered or introduced evidence of appellant's pre-existing criminal

conduct. The eividence offered is not as to his character but rather as to the crimes which actually took place within the time frame set forth in the People's information. No attempt was made here to establish appellant's purported vicious record of prior criminal conduct deemed excessive and prejudicial in Alcala.

II

Was appellant substantially prejudiced by the joinder of the mayhem count with the theft counts by the admission of testimony from other Medi-Cal recipients regarding their tragic surgical results?

In examining the record, we note many surgical victims testifying as to their visual acuities before and after his surgeries. Such testimony is

relevant and goes directly to the People's requirement to show criminal intent and to establish fraud in both the false TARs and grand theft count. It is elemental that there could be no fraud if these surgeries were essential rather than elective.

Appellant's chief complaint is that the Medi-Cal fraud and grand theft could be proven by testimony solely relating to the false TARs and the subsequent billings without testimony regarding surgical malpractice. He concludes by stating that the jurors were unfairly forced to condemn him, not because of the crimes charged, but because of these witnesses' statements of pain, suffering, and visual loss, unfairly impacted on the jurors' sensibilities and objectivity.

This argument ignores the plain fact that the appellant was convicted of all the crimes based upon evidence that a fraud was perpetrated upon the People of this state by the false claims made and the billing for unnecessary surgeries. How could the People be expected to prove up specific intent to defraud and to steal without showing the before and after effect of such surgeries? To accede to appellant's argument, we would have to conclude under Evidence Code Section 352 that all relevant evidence is necessarily inadmissible, because it is prejudicial per se. There is nothing in the record before us to indicate that the judge abused his discretion in allowing relevant foundational evidence.

Such relevancy is tested by

establishing appellant's common plan to commit fraud leading eventually to medical malpractice. The evidence introduced here was neither remote nor insignificant, and is directly related to the crimes. Such Evidence when offered to prove the intent of the appellant to defraud, at any cost, was properly admitted. (People v. Yu (1983) 143 Cal App 3d 358, 377.)

III

Did the prosecutor commit misconduct in her closing argument to the jurors?

In making his contention, appellant cites us to the prosecutor's closing remarks as follows: "Now, I would like to go through some other things that have happened in the course of this trial that I think are very important.

We had the statements of the patients in this case. And I will distinguish them from victims. They are not the victims of this crime. Legally the victims of this crime is the State of California. The theft and the false documents were submitted to the State of California. Patients are (not actual victims), but they are victims in a larger sense. They are victims basically of the defendant's greed.

It's an odd case that way. Might be a hard concept to follow. But legally the theft is from the State of California.

The real theft was the eyesight of those patients. But for purposes of your deliberation and for purposes of the rules in this case, ironically the victim is the State of California . . .

So what the patients said about what the doctor told them does not go to the defendant's intent to defraud Medi-Cal by doing surgeries in which he knew were absolutely unnecessary. And in some instances contraindicated.

These frauds are, in a lot of ways, very simple crimes. They are clean crimes, very nice in the world of crime. Fraud is a clean crime. Some guy sits there and writes something on a piece of paper and sends it to a state agency. And gets a check back in the mail. No one is hurt.

This one is different. This is a malignant fraud because people were hurt. They were blinded. And they were disfigured and they lost everything in the course of a fraud . . .

What was going on is highly

indicative of why this defendant could do what he did do to these people: Blame the patient for their own blindness. Indicating a complete disregard for their sight and for their health. There's an implication: The patient is wrong. Almost a dehumanization of these people.

And if you dehumanize them, then you can falsify the necessity for surgery and do the surgery so you won't get in trouble for not doing the surgery, and then fail to follow up. And the other things that he did and failed to do for these patients. A whole train of questions and answers and lies from the defense.

It couldn't be more perfect because, frankly, it reflects this defendant's attitude toward these people: They

didn't count. So, it didn't matter. What counted was doing the surgery and getting the money.

Sort of a blinding greed . . .

That eye died because the defendant didn't follow up. He let that eye go blind.

And I'll tell you this again goes to the blind greed.

He failed to take intraocular pressures . . .

Those are classic symptoms of glaucoma; that this eye is dying. That this patient exists in excruciating pain. And there are no entries of intraocular pressures. He let that eye die.

He killed that eye, because the medical testimony has been very, very clear. When the pressure builds up in the orbit of the eye, it presses on the

the optic nerve and that nerve dies.

The sight goes. He killed it by no follow up because he was too busy doing surgery. And he had already been paid.

When you are paid by the global fee, that gives you 120 days of follow up.

Why follow up any further? In fact, you're losing money if you do the classic follow up.

And we have had testimony on what the follow up was. And one of the patients was taking intraocular pressure regularly when that patient comes in, because there's a risk. And it's a risk in a diabetic, which Mr. Juvera was.

Who would blame him if he had six beers in him after that kind of constant blinding pain.

The interesting part about this record is the defendant knows he did that,

too. Dr. Hurt tells us 12 to 22 millimeters of mercury was normal intraocular pressure. At the time the defendant gets around to taking intraocular pressures of Mr. Juvera, his pressure is hitting 53 at some points and down to 50. Those entries -- you will go over this record and those entries will be here.

On the false record, the pressures are listed as normal. So he knew what he had done. He knew he hadn't followed up the patient, so he manufactures this record to cover himself.

As a result, Mr. Juvera -- that eye is dead. Mr. Juvera is blind in that eye . . .

And in the other eye, if you will recall the testimony, it was that he put in a Choyce lens, which causes her a

great deal of pain.

So, those lenses sit there. She's absolutely blind. And the reason the defendants did the already blind eye was for the money. It was an extra $585 or -- I'm not sure what Medi-Cal paid, $725 surgery. It was just for the money. And the intraocular lens implant was another $150. That's why he was putting them in. It was for the extra money.

What he did to her good eye was deprive her of the sight that she had.

Now, you saw her. She was an middle-aged diabetic housewife. And to do these surgeries, what he took away from her in exchange for silver in his pocket was to keep her from seeing her grandchildren, perceiving life, all the things that orient us in this world.

And he left her in pain.

And then on cross-examination of Dr. Bernstein, the issue came up as to why she didn't have those lenses removed. If I had had two surgeries like that, I wouldn't go back for more. Rightfully, she's afraid. So, she's going to continue to live in pain. And continue to tear. And continue to suffer that profound loss for fraud. Simple fraud . . .

Mr. Caballero -- now blind in the eye the defendant did . . .

Even Mrs. Reade's testimony, she stopped going to him because she couldn't get in to see him. There she was, she was blind and she couldn't get in to see him. And she had to wait all day.

And Mrs. Lopez would go there. And

she would wait. That's complete disregard for the health of your patients.

But only some guy who, in the course of fraud, can blind people would be able to manifest that sort of disregard. And that's how we know it's intent. It's clear intent. If you don't care, you can do it. If you don't provide the services, don't do an adequate workup, you have the time to see another patient . . .

Complete disregard for the welfare of his patients in the course of his getting money. The Medi-Cal program paid him a lot of money. There was nothing in these depressions, Dr. Gerner agreed, that you or I or 15 percent of males and 7 percent of females in a random population don't suffer.

In the course of this trial I'm sure

some of you have become insomniacs. I know I have."

First, it must be observed that the court instructed the jury with CALJIC No. 1.02 as follows: "Statements made by the attorneys during the trial are not evidence . . .

As to any question to which an objection was sustained, you must not guess what the answer might have been or as to the reason for the objection.

You must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was

stricken out by the court; such matter is to be treated as though you had never heard of it."

In substance the jury was told the prosecution's argument was just that and not evidence.

Second, the prosecutor's summation was in effect her reference to those matters actually part of the record already before them from the numerous witnesses who so testified.

It was legitimate for a prosecutor to state not only her deductions and conclusions drawn from the evidence but to more particularly relate to the jury that in her opinion the evidence showed that the appellant was guilty of those crimes charged. (People v. Katz (1965) 234 Cal App 2d 413, 419.)

Appellant cites, as quoted above,

only a small portion of the prosecutor's lengthy summation of this case to the jury. To this portion and to the rest appellant failed at any point to object to the same. Appellant must object to prosecutorial misconduct during argument at the precise time that it occurs and request a cautionary admonishment from the trial court, or it will be deemed waived. (People v. Chi Ko Wong (1976) 18 Cal 3d 698, 723.)

When there was no objection by appellant to the remarks made by the prosecutor and when the case is not closely balanced showing on appeal that there exists a grave doubt of appellant's guildt, then the conviction must stand. (People v. Gaulden (1974) 36 Cal App 3d 942, 959.)

IV

Did the trial court commit reversible error in admitting substantial and cumulative evidence of uncharged and unrelated conduct as to other disastrous surgical results?

Here appellant again argues that the totality of the record, including his own false documents and records, the chaotic office practices, his high patient practice, his performance of unnecessary elective surgeries, and the resulting pain and suffering, all operate together to require reversal on a record so prejudicial as to deprive appellant of a fair trial. Appellant claims that the trial court erroneously followed an "all or nothing approach" and that it erred in not sua sponte. severing the relevant evidence from the

irrelevant surgical portions of the testimony. In support of his argument he cites principally People v. Guerrero (1976) 16 Cal 3d 719. The Supreme Court held it was reversible error for the trial court to admit evidence of an earlier uncharged rape offense in the murder case when there was no evidence of sexual molestation.

We find this case hardly helpful to him. Althugh some of the surgery results could have been restricted under Evidence Code Section 352, such evidence was nevertheless admissible to show both appellant's recklessness and greed.

Once again we are at a loss to determine how ongoing evidence wholly within the scope of the crimes themselves can be construed to be uncharged

prior criminal activity introduced solely to prejudice the jurors into finding guilt where none exists. Here the record sustains the convictions of guilt, without a trace of appellant's prior conduct, whatever that might have been. The People have met their burden as to the test of relevance by introducing all evidence which tended logically, naturally and by reasonable inference to establish appellant's intent, plan and motive to commit fraud even if innocent suffering was inescapable.

In reviewing the record here in the light most favorable to the People, as we must, we have determined that the evidence introduced is both reasonable and credible allowing the jury to find the appellant guilty beyond a reasonable

doubt of the crimes charged in counts I through VI and VIII. (People v. Johnson (1980) 26 Cal 3d 557, 576.)

Appellant finally refers us to comments made by the court, outside of the jury, when it dismissed the mayhem count pursuant to Penal Code Section 1118.1. While summing up that one of God's greatest gifts is eyesight and that the taking of Ms. Tobio's eyesight was a terrible thing, the court also specifically found that the gross malpractice of the appellant did not reach the level of "intention to blind" Ms. Tobio, as required in that charge.

Here, the count was dismissed, but appellant continued to dwell on Ms. Tobio's sight loss in his defense with his own witness. Thus, whatever the trial judge's personal feelings were

with regard to Ms. Tobio's surgery, such conclusion was (1) never brought to the jurors' attention and (2) never part of their deliberations with respect to fraud and theft.

DISPOSITION

Judgment is affirmed.

NOT TO BE PUBLISHED

CRAHAN, J.*

We concur:

HANSON (Thaxton), Acting P.J.

LUCAS, J.

---

* Assigned by the Chairperson of the Judicial Council.